

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PERCY STOCKTON,

1:10-cv-00774 SMS HC

Petitioner,

ORDER TO SHOW CAUSE WHY PETITION
SHOULD NOT BE DISMISSED FOR LACK
OF JURISDICTION

v.

[Doc. 1]

STATE OF CALIFORNIA, et.al.,

Respondents.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner filed the instant petition for writ of habeas corpus on May 3, 2010. (Court Doc. 1.) Petitioner contends the California Department of Corrections and Rehabilitation is miscalculating his sentence and as a result he is being denied the opportunity to earn half time credits for the time served.

DISCUSSION

I. Exhaustion of State Judicial Remedies

A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct. 1198, 1203 (1982); Buffalo v. Sunn, 854 F.2d 1158, 1163 (9th Cir. 1988).

1 A petitioner can satisfy the exhaustion requirement by providing the highest state court
 2 with a full and fair opportunity to consider each claim before presenting it to the federal court.
 3 Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512 (1971); Johnson v. Zenon, 88 F.3d 828,
 4 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full and fair
 5 opportunity to hear a claim if the petitioner has presented the highest state court with the claim's
 6 factual and legal basis. Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 888 (1995) (legal
 7 basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).
 8 Additionally, the petitioner must have specifically told the state court that he was raising a
 9 federal constitutional claim. Duncan, 513 U.S. at 365-66, 115 S.Ct. at 888; Keating v. Hood, 133
 10 F.3d 1240, 1241 (9th Cir.1998). For example, if a petitioner wishes to claim that the trial court
 11 violated his due process rights "he must say so, not only in federal court but in state court."
 12 Duncan, 513 U.S. at 366, 115 S.Ct. at 888. A general appeal to a constitutional guarantee is
 13 insufficient to present the "substance" of such a federal claim to a state court. See Anderson v.
 14 Harless, 459 U.S. 4, 7, 103 S.Ct. 276 (1982) (Exhaustion requirement not satisfied circumstance
 15 that the "due process ramifications" of an argument might be "self-evident."); Gray v.
 16 Netherland, 518 U.S. 152, 162-63, 116 S.Ct. 1074 (1996) ("a claim for relief in habeas corpus
 17 must include reference to a specific federal constitutional guarantee, as well as a statement of the
 18 facts which entitle the petitioner to relief.").

19 Additionally, the petitioner must have specifically told the state court that he was raising
 20 a federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666,
 21 669 (9th Cir.2000), *amended*, 247 F.3d 904 (2001); Hiiivala v. Wood, 195 F.3d 1098, 1106 (9th
 22 Cir.1999); Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). In Duncan, the United States
 23 Supreme Court reiterated the rule as follows:

24 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion
 25 of state remedies requires that petitioners "fairly presen[t]" federal claims to the
 26 state courts in order to give the State the "opportunity to pass upon and correct
 27 alleged violations of the prisoners' federal rights" (some internal quotation marks
 28 omitted). If state courts are to be given the opportunity to correct alleged violations
 of prisoners' federal rights, they must surely be alerted to the fact that the prisoners
 are asserting claims under the United States Constitution. If a habeas petitioner
 wishes to claim that an evidentiary ruling at a state court trial denied him the due
 process of law guaranteed by the Fourteenth Amendment, he must say so, not only

1 in federal court, but in state court.

2 Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

3 Our rule is that a state prisoner has not "fairly presented" (and thus
4 exhausted) his federal claims in state court *unless he specifically indicated to*
5 *that court that those claims were based on federal law.* See Shumway v. Payne,
6 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in
7 Duncan, this court has held that the *petitioner must make the federal basis of the*
8 *claim explicit either by citing federal law or the decisions of federal courts, even*
9 *if the federal basis is "self-evident,"* Gatlin v. Madding, 189 F.3d 882, 889
(9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the
underlying claim would be decided under state law on the same considerations
that would control resolution of the claim on federal grounds. Hiivala v. Wood,
195 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31
(9th Cir. 1996);

10 In Johnson, we explained that the petitioner must alert the state court to
11 the fact that the relevant claim is a federal one without regard to how similar the
state and federal standards for reviewing the claim may be or how obvious the
violation of federal law is.

12 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added).

13 Upon review of the petition, it appears that Petitioner has not exhausted the state court
14 remedies with respect to his claim. Because it is unclear what, if any, claims presented in the
15 instant federal petition for writ of habeas corpus were exhausted in the state's highest court,
16 Petitioner will be ordered to show cause regarding exhaustion. If possible, Petitioner should
17 present to the Court documentary evidence that the claims were indeed presented to the
18 California Supreme Court.¹

19 II. Name of Proper Respondent

20 A petitioner seeking habeas corpus relief under 28 U.S.C. § 2254 must name the state
21 officer having custody of him as the respondent to the petition. Rule 2 (a) of the Rules
22 Governing § 2254 Cases; Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996); Stanley v.
23 California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the person having
24 custody of an incarcerated petitioner is the warden of the prison in which the petitioner is
25 incarcerated because the warden has "day-to-day control over" the petitioner. Brittingham v.
26

27 ¹A copy of the California Supreme Court's denial alone is insufficient to demonstrate exhaustion. The
28 proper documentation to provide would be a copy of the Petition *filed* in the California Supreme Court that includes
the claim now presented and a file stamp showing that it was indeed filed in that Court.

1 United States, 982 F.2d 378, 379 (9th Cir. 1992); see, also, Stanley v. California Supreme Court,
 2 21 F.3d 359, 360 (9th Cir. 1994). However, the chief officer in charge of state penal institutions
 3 is also appropriate. Ortiz, 81 F.3d at 894; Stanley, 21 F.3d at 360. Where a petitioner is on
 4 probation or parole, the proper respondent is his probation or parole officer and the official in
 5 charge of the parole or probation agency or state correctional agency. Id.

6 In this case, Petitioner names the State of California and California Department of
 7 Corrections and Rehabilitation. Although Petitioner is currently in the custody of the California
 8 Department of Corrections and Rehabilitation, the Department cannot be considered the person
 9 having day-to-day control over Petitioner.

10 Petitioner's failure to name a proper respondent requires dismissal of his habeas petition
 11 for lack of jurisdiction. Stanley, 21 F.3d at 360; Olson v. California Adult Auth., 423 F.2d 1326,
 12 1326 (9th Cir. 1970); see, also, Billiteri v. United States Bd. Of Parole, 541 F.2d 938, 948 (2nd
 13 Cir. 1976). However, in this case, the Court will give petitioner the opportunity to cure his defect
 14 by amending the petition to name a proper respondent. See, West v. Louisiana, 478 F.2d 1026,
 15 1029 (5th Cir.1973), *vacated in part on other grounds*, 510 F.2d 363 (5th Cir.1975) (en banc)
 16 (allowing petitioner to amend petition to name proper respondent); Ashley v. State of
 17 Washington, 394 F.2d 125 (9th Cir. 1968) (same).

18 Accordingly, the Court HEREBY ORDERS:

- 19 1. Within thirty (30) days from the date of service of this order, Petitioner SHALL
 20 SHOW CAUSE regarding exhaustion of the state court remedies and shall
 21 AMEND the Petition to name a proper respondent;
- 22 2. The Clerk of Court is directed to send Petitioner a blank § 2254 form petition; and
- 23 3. Failure to comply with this order may result in the action be dismissed for failure
 24 to comply with a court order. Local Rule 110.

25 IT IS SO ORDERED.

26 **Dated: June 4, 2010**

27 **/s/ Sandra M. Snyder**
 28 UNITED STATES MAGISTRATE JUDGE